SUPREME COURT, U. S.

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FILED
JUN 25 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1968

No. 229

EDWARD STEVE McFARLAND,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit.

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(a)

REFERENCE TO REPORTS OF OPINIONS.

United States of America v. Edward Steve McFarland, Et al., 392 Fed. 2d 192, No. 17,660 is attached as Appendix A.

(b)

STATEMENT OF JURISDICTIONAL GROUNDS.

Judgment of United States Court of Appeals for the Sixth Circuit affirming judgment of District Court of United States, Eastern District of Kentucky entered April 11, 1968.

Order extending time for filing Petition for Rehearing to May 13, 1968 allowed.

Petition for Rehearing denied May 22, 1968.

Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254 (1).

(c)

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the evidence in this case established that Edward McFarland entered into a conspiracy to violate the Mann Act, Title 18, U.S.C. Section 2421?
2. Whether the conviction of this petitioner can be upheld where the government's own evidence shows that when advised that a girl was to accompany another to Chicago in a separate vehicle he immediately disclaimed any participation in such conduct?

3. Where the evidence shows that petitioner did not transport a female in interstate commerce, but later had sexual relations with her and transported her within a state, is such conduct violative of Section 2421, Title 18, U.S.C.?

4. Whether the evidence in this case proves that the interstate transportation had as its dominant motive, the purpose defined in Section 2421, Title 18, U.S.C. as required by *Mortenson* v. *United States,* 322 U.S. 369?

(d)

STATUTES INVOLVED.

Title 18—U.S.C. Chapter 19—Conspiracy—Section 371

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than *five years,* or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18—U.S.C. Chapter 117—White Slave Traffic—Section 2421

Transportation generally.

Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(e)

STATEMENT OF THE CASE.

On Sunday, October 10, 1965, petitioner together with Charles Muncy and Donald Day drove to the Greater Cincinnati area in a Gray Mustang automobile. He arrived at the home of his fiancee at about 4:00 P.M. on that date and was dropped off by Day and Muncy, who subsequently returned to Covington, Kentucky and took a room in a local hotel. The three were to return to Chicago by the same auto on Tuesday, October 12th. (R. 257)

On October 11, 1965 Sharon Stumpe was in a cafe with her mother in Cincinnati when James Thompson came in alone, struck up a conversation with the girl and asked her to go get something to eat. (R. 86) The girl told Thompson it was up to her mother, and after Thompson talked to the mother, the two left, drove across the river to Covington in his Ford or Chevrolet auto. After a night of drinking and carousing the two went to a Covington hotel and had sexual relations. (R. 94)

The following morning Sharon and Thompson drove to a nearby restaurant, and as they were driving in to park, met Donald Day, Charles Muncy and Emma Jean Relthford, also known as Angel. The meeting at the restaurant was accidental. (R. 165) The entire group then returned to Day and Muncy's hotel room, and shortly thereafter Emma Relthford left. During the course of a conversation in the hotel room, Sharon testified that

Donald Day told her that, "if she went to Chicago she would have to engage in prostitution, and that she could make a hundred and some dollars a night, but would have to give them half of it." (R. 108)

At approximately 1:30 P.M. on the 12th of October, Muncy and Day checked out of the Riverview Hotel in Covington in the company of Thompson and Sharon. (R. 193) The group drove in different cars to a girl's house in Covington, Sharon riding in Thompson's car. Day and Muncy went into the girl's house, Sharon and Thompson remained in his auto for a while, then went to a pool room nearby where she had a coke, and then drove to a laundry to pick up some of Thompson's clothes. (R. 105) They returned to the area of the girl's house and met McFarland, who had been picked up at his fiancee's house in Cincinnati in the interim. (R. 257)

Sharon testified that Thompson told her he didn't want her to go to Chicago, but she went anyhow. (R. 131) That she had made up her mind to go at the hotel earlier. (R. 149) When petitioner was advised that Thompson was going to drive the girl to Chicago, he said, "I'm not taking any girl across a state line in my car." (R. 150) Petitioner, Day and Muncy left for Chicago in the Gray Mustang. Sharon and Thompson left at the same time in his Blue Ford or Chevrolet. (R. 151)

The first time that any of the vehicles stopped was at a McDonald's Drive-In in Illinois. (R. 151) In her direct examination Sharon stated that she got in the Gray Mustang of petitioner. In her testimony before the grand jury she stated that she stayed in the Blue auto of Thompson, but that Donald Day got in with her. (R.

153) Sharon never advised the police in Chicago, or the agents of the F.B.I. who interviewed her there following her arrest, that she had ridden in petitioner's auto. (R. 155 and 210)

On cross examination, Sharon admitted that she may have been mistaken about riding in petitioner's auto. (R. 153)

After leaving McDonald's Drive-In the group stopped at a motel in Illinois. Thompson left to visit his sister, leaving Sharon with the others. The three men and the girl stayed in a motel for the night, and all had sexual relations with her.

The following morning petitioner, Day, Muncy and Sharon drove into Chicago, spent part of the day looking for some unnamed person and later that day registered at the Clinton Hotel. That evening petitioner and Muncy took the girl out to eat. The following day, Sharon, Muncy and petitioner were arrested by Chicago Police on the street going to buy some clothes for the girl. Her evasive answers to police officers provoked further questioning by them, and finally she stated that she had run away from home and came to Chicago with the three fellows. (R. 209) Later that day she signed a statement at the police station in Chicago using the name Sherry Oden, which was the name of her step father.

Sharon was detained in Chicago for a month, and subsequently returned to the Girls Industrial School at Scioto Village, Ohio where she remained until the trial. Prior to October 11th, 1965, Sharon had run away from home on more than nine occasions, (R. 161) had been to Florida with other girls and boys, and had run away from the Industrial School before. (R. 159)

On cross examination, Sharon testified that when she left the restaurant and went to the Riverview Hotel with Day, Muncy, Thompson and Emma Relthford, Day and Muncy were packing their suitcases. She admitted that she did not want to go back to Cincinnati because she was scared of her mother. (R. 165) Sharon admitted that, "she had latched on to Thompson and wasn't going to let go." She did not engage in prostitution (R. 167), and could not recall whether she had given three or four versions of what had occurred.

The petitioner did not testify, nor did any of the co-defendants.

Petitioner was convicted with three others of one count of conspiracy to violate and one count of substantive violation of the Mann Act, Title 18, Sections 371 and 2421 U.S.C., and was sentenced to the custody of the Attorney General for a term of 5 years on each count, said sentences to run concurrently.

(f)

REASONS FOR GRANTING THE WRIT.

The decision here is in conflict with this Court's holdings in *U. S.* v. *Hirsch,* 100 U.S. 33, *U. S.* v. *Falcone,* 311 U.S. 205, *U. S.* v. *Glasser,* 315 U.S. 60 and *U. S.* v. *Mortensen,* 322 U.S. 369.

A consideration of the issues presented by the facts of this case requires a determination of the following

(1) Does the evidence in this case, even when construed most favorable to the Government, prove that petitioner entered into the conspiracy charged in the indictment?

(2) Did the interstate transportation of the female have as its dominant motive the activities proscribed in Section 2421, Title 18 U.S.C. so as to sustain the conviction of petitioner?

(1) Does the evidence in this case, even when construed most favorable to the Government, prove that petitioner entered into the conspiracy charged in the indictment?

The only evidence contained in this record that could in any way be construed as an agreement to do an illegal act so as to constitute a conspiracy is the conversation between Donald Day and Sharon Stumpe in the Riverview Hotel in Covington, Kentucky on October 12, 1965. It was at this time, and the only time in this record, where there was any conversation relating to prostitution or immoral purposes. Day was quoted as saying

that if Sharon came to Chicago she would have to engage in prostitution and divide the proceeds with them.

Sharon testified and positively identified Day as the person who made the statement, and clearly identified the only other persons present as Charles Edwards (Charles Muncy) and Jimmie Valo (James Thompson). (R. 101, 107)

The prior chance meeting at the restaurant was in no way related to any plan or agreement, and certainly prior to the conversation there was no conspiracy to violate federal law.

There is no serious contention that petitioner was ever present at the hotel. Sharon stated that she first laid eyes on petitioner later that afternoon in front of a girl's house, long after checking out of the hotel. (R. 149) This record is absolutely bare of any further reference of prostitution or immorality relative to anyone. Similarly there is no showing that petitioner, when he joined Day and Muncy for the return trip to Chicago as planned, was told, advised or informed of the substance of the conversation that took place earlier that day in the hotel room.

The Court of Appeals rested affirmance of petitioner's conviction on the following:

> "It was shown by the Government beyond a reasonable doubt that *there was agreement between the four defendants* that they would go by automobile from Covington to Chicago, and that they would take this seventeen-year old delinquent girl with them to Chicago and would there set her up in prostitution."

We respectfully suggest that such a conclusion is totally without support in this record. By some mystical process,

not explained by the government in their brief below, or by the Court of Appeals in its opinion, knowledge of the evil and illegal intentions of others is imputed to petitioner by virtue of his presence in keeping a date he had made several days before to return to Chicago with Donald Day and Charles Muncy.

Those having no knowledge of the conspiracy are not conspirators, *U. S.* v. *Hirsch*, 100 U.S. 33. Nor is there any evidence from which knowledge could be inferred. Sharon Stumpe attached herself to James Thompson, and when Thompson accidentally met some friends who were returning to Chicago and decided to accompany them, he told the girl to either stay in Covington or go back to her mother in Cincinnati. Sharon refused. Petitioner's mere presence could not give rise to any sinister implication that he was lending his support to any plan, or that he even knew of a plan. Neither association with conspirators or knowledge that something illegal is going on, by themselves, constitutes proof of participation in a conspiracy. *U. S.* v. *Falcone*, 311 U.S. 205, *Glasser* v. *U. S.*, 315 U.S. 60. If knowledge of a conspiracy could be inferred from mere presence or association with another, no one would be exempt from criminal culpability who is within the range of activity of a conspirator, no matter how innocuous the contact. Whatever plans that were conceived were done so without regard to petitioner, and were never related to him.

When petitioner was advised that Thompson was going to take the girl to Chicago, he specifically disclaimed participation in such conduct by refusing to let the girl ride in his car. Such declaration evidences disagreement rather than agreement, which is the essential element of

conspiracy. This evidence, illicited from the government's principal witness, negatives the very inference on which the Court of Appeals rested its affirmance, i.e. *"that there was agreement between the four defendants . . ."*

Not until Thompson left Sharon at the motel in Illinois, did she ride in petitioner's car. This record is bare of any evidence that petitioner aided, abetted, assisted or comforted anyone in the illegal transportation of the girl. A defendant who does not participate in the actual transportation of a female in interstate commerce, although he later participates in transporting her within a state does not violate Section 2421, Title 18, U.S.C., *U. S.* v. *Twitchell,* C.A. Wash. (1964), 330 Fed. 2d 759; 156 A.L.R. 965.

The opinion of the Court of Appeals, recognizing the lack of evidence against the petitioner as to the essential elements of the substantive offense, rested their affirmance on the conspiracy in holding:

> "If he was a party to the conspiracy, it is immaterial whether the girl rode across the state line in his car or in the car of a confederate. The jury had the right to reasonably conclude, both from McFarland's conduct before the parties left Kentucky and afterwards, that he was a party to the conspiracy from the outset."

How, in light of the government's own evidence that Sharon did not set eyes on petitioner until shortly before he left with two others for a return trip to Chicago, and that he had nothing to do with her until after Thompson left her at a motel in Illinois, can it logically be concluded that petitioner was a party to the conspiracy from the outset.

We respectfully invite this Court's attention to the concurring opinion of Justice Jackson in the reversal of *Krulewitch* v. *United States,* 336 U.S. 440, 69 Sup. Ct. Rep. 716 at 719, also a Mann Act conviction, wherein it is stated:

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoers without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

(2) The evidence in this case fails to show that the interstate transportation of the female had as it dominant motive the activities proscribed in Section 2421, Title 18, U.S.C. so as to sustain a conviction of the appellant McFarland.

In a prosecution for violation of the Mann Act, the primary issue is whether there is any evidence that the woman was transported on a journey for an immoral purpose. The statute thus penalizes only those who use interstate commerce with a view toward accomplishing the unlawful purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such a woman or girl to become a prostitute or give herself up to debauchery or to engage in any other immoral practice.

Mortensen v. *United States,* 322 U.S. 369, 373, at 374; *Oriolo* v. *U. S.,* 324 U.S. 824, 146 Fed. 2d 152; and *Becker* v. *U. S.,* 348 U.S. 957, 217 Fed. 2d 555. In the *Mortensen* case the Supreme Court stated:

> "* * * To constitute a violation of the Act, it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities. *Hansen* v. *Haff,* 291 U.S. 559. *An intention that the woman or girl shall engage in the conduct outlawed by para. 2* must be found to exist before the conclusion of the interstate journey and *must be the dominant motive of such interstate movement.* And the transportation must be designed to bring about such result. Without that necessary intention and motivation, *immoral conduct during or following the journey is insufficient* to subject the transporter to the penalties of the Act." (Italics supplied.)

The dominant motive in the instant trip was not the immoral purpose which occurred during or following the journey insofar as the appellant McFarland was concerned. He had planned the journey to Chicago at least two days before he ever laid eyes on Sharon Stumpe. He contemplated the trip with Muncy and Donald Day. Prior to any conversation that might be construed as indicating any immoral purpose, and at the time Sharon accompanied the others from the restaurant to the hotel, they were packing their suitcases. Whatever incidental and immoral purpose may have been conceived by others, McFarland was not aware of, nor does the evidence show that it was told to him. McFarland left in his own car with Muncy and Day as planned. He flatly refused to participate in any transportation of the girl. The fact that Thompson and the girl followed in Thompson's car

was an element over which McFarland had no control or dominion over. At no time during the interstate movement did he have anything to do with her or her transportation. Others may have changed vehicles, but this too was a matter over which he had no control. In matters that relate to sex we had best not be our brother's keeper. The immorality which occurred was an incident that arose only after Thompson, who up to this point had been the girl's exclusive paramour and transporter, for some unexplained reason departed the scene. It is not essential that we condone the immoral conduct of the appellant, but a dispassionate weighing of the government's evidence leads to the conclusion that the dominant motive of the interstate movement by McFarland was not that the girl should be transported in interstate commerce for the purpose of prostitution or other immoral purposes, for on that issue he was clear and unequivocal at that crucial instant when motive and intent were significant factors. The events that transpired later, no matter how morally undesirable, cannot operate to change or alter that dominant motive so as to bring it within the Act.

(g)

CONCLUSION.

If this Court agrees that the instant decision is in conflict with existing authority of this Court as relates to the statutes involved, then certiorari should be granted to resolve the conflict or correct the judgment.

Respectfully submitted,

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APPENDIX A

Nos. 17659-17662

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 17,659

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD DOUGLAS DAY,
Defendant-Appellant,

No. 17,660

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDWARD STEVE MCFARLAND,
Defendant-Appellant,

No. 17,661

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES ALLEN MUNCY,
Defendant-Appellant,

No. 17,662

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES THOMPSON,
Defendant-Appellant,

ON APPEAL from the United States District Court, Eastern District of Kentucky.

Decided April 11, 1968.

Before: O'Sullivan, Phillips, and Combs, Circuit Judges.

Per Curiam. The four defendants, Donald Douglas Day, Edward Steve McFarland, Charles Allen Muncy, and James Thompson, were convicted of conspiracy to violate and the substantive violation of the Mann Act. 18 U.S.C. §371 and 18 U.S.C. §2421. It was charged in the indictment that the four defendants conspired to and did transport a seventeen-year-old girl from Covington, Kentucky, to Chicago, Illinois, for the purpose of having her engage in prostitution. All of the defendants were found guilty by a jury on both counts of the indictment and were sentenced to five years imprisonment on each count, the sentences to run concurrently.

The Government's case was made primarily by the testimony of the girl involved. None of the defendants testified.

All of the defendants rely on appeal upon the ground that the testimony of the girl is so vague and contradictory as to be unworthy of belief. McFarland contends additionally that there is no evidence to connect him with either the conspiracy or the substantive offense charged in the indictment.

It is not necessary that the evidence be reviewed in detail here. It is not a pretty story. It was shown by the Government beyond reasonable doubt that there was agreement between the four defendants that they would go by automobile from Covington to Chicago, and that they would take this seventeen-year-old delinquent girl with them to Chicago and would there set her up in prostitution.

It was established by the Government through the testimony of the girl that the four defendants and the girl left Covington about the same time, travelling in two separate automobiles. Day, Muncy, and McFarland were in a gray Mustang; Thompson and the girl were in a blue Ford or Chevrolet. The five stopped for hamburgers

and a visit between cars at a drive-in restaurant in Illinois. They stopped overnight at a motel in Illinois and all of the defendants except Thompson, who had gone to visit his sister, had carnal knowledge of the girl. In Chicago, the defendants and the girl moved into a cheap hotel and the defendants made plans to get her set up in the business of prostitution. McFarland and Muncy, accompanied by the girl, were on their way to buy new clothes for her when they were stopped by police officers. Their evasive answers to questions led to their arrest and the arrest of the other two defendants.

The evidence is clearly sufficient to sustain the jury's verdict. It is true, as pointed out by the defendants, that the girl told her story on the witness stand in a rambling, disconnected manner; at times she was evasive and even contradictory. Even so, the elements of the offenses charged were either proved specifically or facts were proved from which the jury could reasonably infer the guilt of all of the defendants.

With reference to McFarland, we have not overlooked the testimony of the girl that before the parties left Covington he said, "I'm not taking any girl across the state line in my car." This is not proof of innocence. It is merely proof that this defendant had a superficial knowledge of the dangers inherent in the Mann Act. If he was a party to the conspiracy, it is immaterial whether the girl rode across the state line in his car or in the car of a confederate. The jury had the right to reasonably conclude, both from McFarland's conduct before the parties left Kentucky and afterwards, that he was a party to the conspiracy from the outset.

All of the defendants were well represented at the trial by employed counsel and their rights were carefully protected by the trial judge. The question of their guilt or innocence was for the jury.

The judgments are affirmed.